11/17/00

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CHAMBERS OF
MICHAEL BOUDIN
U.S. CIRCUIT JUDGE

UNITED STATES COURTHOUSE
SUITE 7710
1 COURTHOUSE WAY
BOSTON, MA 02210
617-748-4431

November 14, 2000

00-AP-D

Honorable Will Garwood
U.S. Senior Circuit Judge
for the Fifth Circuit
300 Homer Thornberry Judicial Building
903 San Jacinto Boulevard
Austin, Texas 78701

Dear Will:

I sent this originally to Tony Scirica but he said that it should be referred to you. I am also sending a copy to Peter McCabe for the standing committee's records. There is nothing remarkably urgent about this but it may be another small good idea to be pondered in due course.

Best regards.

Sincerely,

M. Boudin

cc: Peter G. McCabe ✓
Professor Daniel Coquillette

United States Court of Appeals
For The First Circuit

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MICHAEL BOUDIN
U.S. CIRCUIT JUDGE

UNITED STATES COURTHOUSE
SUITE 7710
1 COURTHOUSE WAY
BOSTON, MA 02210
617-748-4431

November 6, 2000

Honorable Anthony J. Scirica
U.S. Court of Appeals
Third Circuit
22614 U.S. Courthouse
Independence Mall West
Philadelphia, Pennsylvania 19106

Dear Tony:

My court has asked me to request that the Standing Committee consider an amendment to Fed. R. App. P. 29 to make clear that a court of appeals is entitled at its discretion to preclude the filing of a particular private amicus brief, even if all parties have consented to the filing. The requested amendment or clarification would not curtail the existing right of government entities to file amicus briefs without consent of the court. The principal concern is with private amicus briefs that would result in the obligatory recusal of a member of the panel.

There is nothing in the existing Rule 29 that squarely precludes a court, by local rule or by order, from prohibiting private amicus briefs that would have this effect. My own view, subject to more research, is that such a local rule or order would be valid because the critical language in the present rule--the last sentence of Rule 29(a)--was not intended to address the issue of court-initiated prohibitions but simply was intended to spare the court the need (where none of the parties objected) to consider whether an amicus brief was appropriate.

Nevertheless, some have read the literal language of the sentence as implying an unqualified right to file a private amicus brief, so long as it is timely and so long as consent is obtained. And, while there are fairly broad statements here and there about the authority of courts to regulate the filing of amicus briefs (see Dick Posner's N.O.W. v. Scheidler, a copy of which is enclosed), a brief search does not reveal any authority squarely in point that applies this generality to a private amicus brief for which consent is obtained from all parties. The D.C. Circuit does have a local rule that precludes amicus briefs at the rehearing

stage without permission (Local Rule 35(f)) but it is possible to distinguish this situation.

The policy issue seems to me a fairly easy one. Amicus briefs are sometimes useful but almost never necessary and there is a risk that they can be used strategically to cause the recusal of individual judges. Even when they are not so intended, the benefit of maintaining the original panel or, more important, a full en banc court may be far greater than the benefit of an amicus brief. Under present circumstances, all parties usually do not consent to amicus briefs and so the court can take recusal into account in deciding whether to grant leave; it is only in the case of consent that there is some doubt about the court's ability to protect itself. Barring the amicus brief does not always avoid a recusal problem but often it may do so.

If further study identifies clear authority for the view that a court can now adopt a rule requiring the leave of court for all amicus briefs, this would satisfy our concern. There may be some other mechanism for clarifying the court's authority that would also serve. But if neither of these courses is available, the active judges of my court are unanimously of the view that this small, almost certainly accidental, loophole should be closed--not in terms that would require courts to do anything but leaving it entirely to them to decide whether and what to do: e.g. (as a proviso to FRAP 29(a)), "provided that the court may by rule or order require leave of court for the filing of amicus briefs other than those filed by governmental entities or officers."

Sincerely,

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 99-3076, 99-3336, 99-3891 & 99-3892

NATIONAL ORGANIZATION FOR WOMEN, INC.,
on behalf of itself and others, *et al.*,

Plaintiffs-Appellees,

v.

JOSEPH M. SCHEIDLER, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 7888—**David H. Coar**, *Judge.*

SUBMITTED MARCH 13, 2000—DECIDED MARCH 14, 2000
OPINION JULY 31, 2000

Before POSNER, *Chief Judge*, and KANNE and DIANE P. WOOD, *Circuit Judges.*

POSNER, *Chief Judge.* On February 26 of this year, the motions judge for the week denied the requests of Priests for Life, Life Legal Defense Foundation, and the Southern Christian Leadership Conference for permission to file amicus curiae briefs in support of the appellants. Reconsideration of the judge's order was twice sought by one of the appellants, the second time urging that a three-judge panel consider the requests even though the court has, pursuant to Fed. R. App. P. 27(c), delegated the

decision of such requests to a single judge, the motions judge for the week in which the request is filed. 7th Cir. Operating Proc. 1(a)(1). The requests were, however, referred to the entire motions panel, and by it denied, and we have decided to issue an opinion explaining our denial in the hope of clarifying the court's standards for amicus curiae briefs.

Whether to permit a nonparty to submit a brief, as amicus curiae, is, with immaterial exceptions, a matter of judicial grace. Fed. R. App. P. 29(a); *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991); *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970); cf. *Miller-Wohl Co. v. Commissioner of Labor & Industry*, 694 F.2d 203, 204 (9th Cir. 1982). The reasons are threefold (see *Ryan v. CFTC*, 125 F.3d 1062 (7th Cir. 1997) (chambers opinion); *Community Ass'n for Restoration of the Environment v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999); *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999); *United Stationers, Inc. v. United States*, 982 F. Supp. 1279, 1288 n. 7 (N.D. Ill. 1997)):

1. We court of appeals judges have heavy caseloads requiring us to read thousands of pages of briefs annually, and we wish to minimize extraneous reading. It would not be responsible for us to permit the filing of a brief and then not read it (or at least glance at it, or require our law clerks to read it), at least when permission is granted before the brief is written, and so reliance on our reading it invited. Therefore amicus curiae briefs can be a real burden on the court system. In addition, the filing of an amicus brief imposes a burden of study and the preparation of a possible response on the parties.

2. Amicus curiae briefs, which we believe though without having proof are more often than not sponsored or encouraged by one or more of the parties in the cases in which they are sought to be filed, may be intended to circumvent the page limitations on the parties' briefs, to

the prejudice of any party who does not have an amicus ally. The lawyer for one of the would-be amici curiae in this case admits that he was paid by one of the appellants for his preparation of the amicus curiae brief. And that appellant comes close to admitting that its support of the requests to file amicus briefs is a response to our having denied the appellant's motion to file an oversized brief.

3. Amicus curiae briefs are often attempts to inject interest-group politics into the federal appellate process by flaunting the interest of a trade association or other interest group in the outcome of the appeal.

The policy of this court is, therefore, not to grant rote permission to file an amicus curiae brief; never to grant permission to file an amicus curiae brief that essentially merely duplicates the brief of one of the parties (for a particularly egregious example of such an amicus brief, see *United States v. Gotti*, 755 F. Supp. 1157 (E.D.N.Y. 1991)); to grant permission to file an amicus brief only when (1) a party is not adequately represented (usually, is not represented at all); or (2) when the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may, by operation of stare decisis or res judicata, materially affect that interest; or (3) when the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do. *Ryan v. CFTC, supra*, and cases cited there; see also *United States v. Boeing Co.*, 73 F. Supp. 2d 897, 900 (S.D. Ohio 1999). The first ground is not available to these requesters; the appellant's argument that no one can adequately represent it within the page limits permitted by this court is, of course, a reason against granting the request—it is an end run around our order denying permission to file an oversized brief. The second ground is illustrated by the two amicus curiae briefs that the motions judge did allow to be filed on behalf of the appellants, for both of those amici curiae are organizations faced with the same

kind of civil RICO claims that formed the basis of the judgment against the appellants. Finally, none of the rejected briefs presents considerations of fact, law, or policy overlooked by the appellants, who have filed briefs totaling 104 pages. So ground (3) is unavailable as well.

These requests for leave to file amicus curiae briefs were therefore properly denied.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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